1958

Dairy Distributors, Inc. v. Local Union 976 et al : Brief of Plaintiff and Respondent

Utah Supreme Court

Hanson, Baldwin and Allen; Walter L. Budge; Attorneys for Plaintiff and Respondent;

IN THE SUPREME COURT
of the
STATE OF UTAH

DAIRY DISTRIBUTORS, INC.,
Plaintiff and Respondent,

vs.

LOCAL UNION 976, JOINT COUNCIL 67, WESTERN CONFERENCE OF TEAMSTERS, THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA — A.F.L. — C.I.O., MILO B. RASH, CLARENCE LOTT and JOSEPH W. BALLEW,
Defendants and Appellants.

Case No. 8823

BRIEF OF PLAINTIFF AND RESPONDENT

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ROBERT W. BRANDT

June 16, 1958

Mr. L. M. Cummings
Clerk of the Supreme Court
State Capitol Building
Salt Lake City, Utah

Re: Dairy Distributors vs. Local Union 976 et al
Case No. 8823

Dear Mr. Cummings:

In accordance with the permission granted by the Chief Justice during the oral argument on this case, we wish to make the following corrections on the respondent's brief by interlineation:

On Page 4, after the word "unloaded" on line 10, reading from the top of the page, the following should be inserted, "by Dorman's and myself and a couple of Dorman's boys."

On Page 7 of the brief, four lines reading from the top, the word "August" should be changed to "October."

Very truly yours,

HANSON, BALDWIN & ALLEN

By Rex J. Hanson

RJH:jh
cc: Clarence Beck

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July 7, 1958

Hon. Rodger I. McDonough
Chief Justice and Members of the Court
Supreme Court of Utah
State Capitol Building
Salt Lake City, Utah

Re: Dairy Distributors, Inc.
Plaintiff and Respondent
-vs-
Local Union 976, et al,
Defendants and Appellants
Case No. 8823

Honorable Judges:

With the Court's indulgence and permission, we seek to draw the Court's attention to two matters concerning the briefs of the parties in this appeal.

First: Error in respondent's (our) brief. By inadvertance the term "respondents" appears in place of "appellants" on the following pages:

Page 36, second paragraph, line 2, 7 and last line.
Page 37, line 8 from top of page.
Page 42, next to last line.

Second: The following statement taken from appellants' reply to respondent's brief. At page 12 of said brief appellants write:

> "Respondent next appears to use the Campbell Coal case and the Service Trade Chauffeurs case as a weapon against appellants, based on the assumption that the Cache Valley Dairy Association was the primary employer and that the plaintiff, the Dairy Distributors, Inc. was not a primary employer but was a secondary company. The appellant has adopted the view, as did the trial court, that since Gossner was the sole owner, manager, employer and actual operator of both operations which processed and transported the cheese, and since these operations, although technically under separate legal entities, were completely integrated and interdependent, they must be regarded as a single operation for the purpose of the Taft Act." (Emphasis Added)

We find nothing in the record to substantiate any such declaration. We invite your appellants do cite the testimony, page and volume, upon which they would rely for this erroneous statement. Indeed, the record is clearly to the contrary.

Testimony of Edwin Gossner shows:

Q. What is your profession or occupation?

A. My profession is cheese making and I manage a cheese Plant. (Tr. 8)

* * *

Q. At the present time do you have any connection with the Cache Valley Dairymens Association?

A. I manage the cheese operation; I manage the whole dairy operation.

Q. How long have you been so employed by them as a manager of their cheese or dairy operation?

A. I got a contract with the Cache Valley Dairy Association in October of 1941, to process their milk into cheese, and other dairy products, on a percentage basis.

Q. Can you tell the Court and jury something about what the Cache Valley Dairymens Association is, what is it in ordinary terminology?

A. The Cache Valley Dairy Association is a group of farmers that formed what is formally known as a co-op for the purpose of marketing the milk that they produce on the farms and receive the highest price for the milk possible. (Tr. 8)

* * *

and on cross examination:

Q. (By Mr. Beck). Let's see about that, Mr. Gossner, let's recap here. You operated a cheese plant up there on 15% gross contract?

A. That is what the contract read. (Tr. 41)

* * *

Arne Hanson testified:

> Q. In your business, or your occupation for Dairy Distributors as bookkeeper, will you tell the court and jury the manner in which you kept the books for Dairy Distributors, what procedure was followed?
>
> A. We kept a complete set of books on all operations of Dairy Distributors, ledgers and everything, and had an auditor there every quarter and yearly a statement was made for tax purposes. (Tr. 64, 65)
>
> * * *

and on voir-dire:

> Q. There is nothing in these books that has to do with the Association up there?
>
> A. No sir. (Tr. 66)
>
> * * *

This testimony and an abundance of other testimony of record shows that Gossner was an employee of Cache Valley Dairymens Association, and that Gossner was an incorporator and owner of Dairy Distributors, Inc. The truth of the matter is that defendants and appellants knew that such were the facts. Ross Thoreson testified:

> "During this meeting for the first time the Union asked us to include the employees of Dairy Distributors under a contract and I advised them we couldn't include them in the same contract because in our opinion there were two different companies and there would have to be two separate contracts, and one of them said that would be all right if we would agree to it but that the drivers had to be covered with contract to." (Tr. 186, 187)

There is no justification for appellants' bald statement that the trial court "adopted the view * * * that Gossner * * * was the sole owner * * * of both operations." Respondent not only "appears" to be challenging any such "adopted view" of appellants but does and since the commencement of this action has steadfastly maintained, as the record shows, that Edwin Gossner was an employee-manager for Cache Valley Dairymens Association, and that:

A. The Cache Valley Dairy Association is a group of farmers that formed what is formally known as a co-op for the purpose of marketing the milk that they produce on the farms and receive the highest price for the milk possible. (Tr. 8)

Cache Valley Distributors, Inc. was not an operation, "straight line" or at all of the Dairymens Association.

Q. (By Mr. Hanson). Will you tell the court and jury who the officers and stockholders of this corporation were?

A. The stockholders were Mrs. Gossner, my wife, and myself and my son Edwin Junior, and Delores, my daughter, and Arnie Hansen.

The officers are: I am president of the corporation, Mrs. Gossner, vice-president, and Arnie Hansen is secretary-treasurer.

Q. Now, as I understand your testimony, the company was organized in 1952 and what was the condition of, or how did your business go from that time on until about 1955, the spring of 1955?

A. The business was surprisingly successful. It started out small and naturally we had enough cheese to go to New York, but we had equipment that was not new. We encountered our problems, but we made money on every trip which enabled us to buy additional equipment and enlarge our operation, and find good back hauls in New York and vicinity, and we found a better market for those products every year out in this country, so it became a very successful, and a very profitable operation. (Tr. 13, 14)

To say otherwise is to be-lie the record.

Respectfully submitted,

HANSON, BALDWIN & ALLEN
WALTER L. BUDGE

By R. J. Hanson
Attorneys for Respondent

JH:le

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POINT I.

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tributors ceased shipping to New York and the Cache Valley Dairymen's Association attempted thereafter to ship its cheese by common carrier, but this operation was interferred with because of "labor trouble" at the cheese factory. Dairy Distributors shipped one more truckload of cheese in September, 1955, which was not unloaded because of union interference and which had to be placed in storage. In October, another load was shipped, which was picketed but unloaded. Subsequent to October, 1955, Dairy Distributors made no further attempt to transport cheese to New York, their only profitable trucking operation, and began disposing of their equipment. The termination of the trucking operation by the corporation was neither voluntary nor optional. They were forced into a position of incurring a risk too great to bear. With each individual load of cheese representing an investment of twelve thousand dollars ($12,000.00), no small family corporation such as Dairy Distributors could afford the danger of being stranded with such costly, highly perishable cargo at the farthest place in the nation from its home operation.

Thereafter, on June 29, 1956, suit was commenced. The jury returned its verdict in favor of the plaintiff and against the defendants, Local Union No. 976, Joint Council No. 67, the Western

Conference of Teamsters, the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America A.F.L.-C.I.O. and Joseph Ballew in the sum of $100,000.00 on October 29, 1957.

From the judgment on the verdict this appeal results.

STATEMENT OF FACTS

To the cause at bar the operation of the Cache Valley Dairy Association is merely incidental. We are here concerned with the damage done Dairy Distributors, Inc. by the wrongful acts of the defendants in this independent corporation's conduct of its business. The fact that Edwin Gossner was employed by the Dairy Association and was also an incorporator and president of Dairy Distributors is not material although defendants' activities were directed against both the Association and Dairy Distributors, Inc. The facts cannot be in dispute. Dairy Distributors, Inc. was a separate corporate entity entirely set apart from the Cache Valley Dairying Association or any other business enterprise (Tr. 66); any contention of the defendants to the contrary notwithstanding.

The incorporators and stockholders of Dairy Distributors, Inc. were Edwin Gossner, his wife, his son Edwin, Jr., his daughter Delores and one Arnie Hansen (Tr. 13). These people formed this

closed corporation in September of 1952 (Tr. 12). The executive board of the Cache Valley Dairying Association had declined to go into the trucking business (Tr. 11). Dairy Distributors purchased the necessary motorized equipment and employed the necessary personnel to carry on the trucking operation (Tr. 14-15). The net profit for the years 1953, 1954 and the first half of 1955 averaged $1,000.00 per month (Tr. 29).

Dairy Distributors' principal source of income was from business transacted with Dorman and Company of New York City (Tr. 16). On or about July 27th of 1955, Dorman advised Dairy Distributors that there was a picket line in front of the Dorman establishment and that Dorman employees would not cross the picket line and did not want to unload the cheese from Dairy Distributors' truck (Tr. 16). See Plaintiff's Exhibits 5, 6, 7, 8, 9, 10, 11, 13, 14, and 15. The picketing signs read:

NOTICE
The Cheese *Carried and Delivered*
By This Truck Has Been Worked
Processed By
NON-UNION
EMPLOYEES
of the *Cache Valley Dairy-*
Mens Assoc. Smithfield, Utah
Teamsters Joint Council No. 67
Plaintiff's Exhibit No. 13 (Emphasis added).

From that time on Dairy Distributors' business was disrupted (Tr. 17); they made but two more shipments of cheese to New York, one in September and another in August. Normally Dairy Distributors had two trucks on the road steadily, one going east and one returning to the west (Tr. 15). There had never previously been a dispute between Dairy Distributors, or the Dairy Distributors' employees, and the Teamsters Union (Tr. 21, 22). The Union had attempted to secure recognition as the representative of the employees of Cache Valley Dairymens Association (Tr. 22). On cross examination the witness Edwin Gossner was asked:

> Q. Have you made an effort to get in any other kind of business since October 1955 if you employed this equipment?

And thereafter the record shows:

> A. I was told by Rash they would picket every place we would go, it would be financial suicide unless we find out about picketing and secondary boycott.
>
> Q. The reason you went out of business was because of the picketing difficulties?
>
> A. The Dairy cheese picketing in New York.
>
> Q. The sole reason you went out of business was because you had serious labor difficulties?
>
> A. Dairy Distributors had no labor difficulties to my knowledge.

Q. Who did have the difficulties, why did you go out of business then?

A. On account of the cheese couldn't be handled any more by Dairy Distributors. The employees didn't give me any trouble, — had no labor trouble.

Q. The reason you did go out of business was because of labor difficulties as I get it?

A. Because of picketing. (Tr. 40).

Arnie Hansen, bookeeper for Dairy Distributors, identified the corporation's books. He testified that the books of Dairy Distributors had nothing to do with the Cache Valley Dairymens Association (Tr. 66).

Paul B. Tanner, Certified Public Accountant, was auditor for Dairy Distributors (Tr. 68, 69). The corporation audits were admitted in evidence (Tr. 71). The books and audits show the corporation's operation to have been a profitable one. When the books were closed the assets were $56,131.00 as against liabilities of $6,808.71 (Tr. 224).

Plaintiff called Milo Rash, the Secretary and Treasurer of Local Union 976, and Trustee of Joint Council 67 (Tr. 102). This witness, in company with the defendant Joseph W. Ballew, an employee of the Western Council of Teamsters (Tr. 142), went to New York on or about May 31, 1955 to see Mr. Louie Dorman (Tr. 102). They there went to the

Local Union of which Dorman employees were members and had the Secretary-Treasurer of that Union, a Mr. Ristuccia, call Dorman to the Union office (Tr. 103). The witness was evasive as to what took place at that meeting. (Tr. 103, 104). On July 26 and 27, this witness picketed Dairy Distributors' truck at Dormans in New York City (Tr. 105-110) as did Clarence Lott (Tr. 234). Rash conversed with one Rosen, a member of the New York Local Union and a foreman of Dorman employees, at the time of the picketing (Tr. 111, 112). On cross examination this witness testified:

> A. Our purpose in going to New York was to talk to Mr. Dorman and try to get him to put pressure on Mr. Gossner with us and, of course, the question to cover the employees of Cache Valley.
>
> Q. Cache Valley Dairy?
>
> A. And also the truck driver, I asked several times they meet with us. (Tr. 114-115).

And,

> Q. When you went to New York, who was the duly organized bargaining agent for the employees?
>
> A. 976. (Tr. 115).

However, on re-direct this witness admitted:

> Q. And at the time you went back to New York, is it your contention Number 976 had been certified by the National Labor Re-

lations Board as bargaining agent for those employees or not?

A. We were recognized bargaining agent by his signed contract before.

Q. Had you been certified by the National Labor Relations Board when you went back to New York?

A. It wasn't necessary.

Q. Answer "yes" or "no": Had you been certified by the National Labor Relations Board when you went back to New York on May 31st, 1955?

A. No.

Q. And have you been certifed, your organization been certified as bargaining agent of the employees of the Dairy Distributors when you went back to New York on May 31st, 1955?

A. The same answer, "no".

Q. Have you ever had a contract with any of the employees of Dairy Distributors when you went back to New York in May of 1955?

A. Before that?

Q. With the employees of Dairy Distributors?

A. Before 1955?

Q. Yes?

A. Some of the employees that drove Dairy Distributors trucks were Union members before — in 1952.

Q. That isn't what I asked you.

I asked you whether you had a contract with Dairy Distributors before 1955, or at any time?

A. No. We didn't know there was any difference between them and Cache Valley Dairy Association, then. (Tr. 118, 119).

Local Union 976 of which the witness was Secretary-Treasurer was under a trusteeship and the trustee, John M. Annan of Los Angeles, California, was appointed to that position by the International Union (Tr. 121-123). On further re-direct examination and as to "Mr. Ballew" and the "Teamsters" the witness stated:

Q. Mr. Rash, did I understand you to say Mr. Ballew was sent here to Utah to assist you in your problem?

A. Yes sir.

Q. And he was — where did he come from?

A. The office of the Western States Dairy Employees Council, it is at Seattle, Washington.

Q. Is that a division of the Western Conference of Teamsters?

A. It is not the Western Council of Teamsters, I don't believe. It is a separate division that the local Unions that have members working in the dairy industry pay a per capita tax on the members, they have in the dairy industry, into Western States Dairy Employment Council.

Q. Does Western Teamsters have other employees except Western dairies?

A. It is a warehouse council, automotive council, over the road council.

Q. And do you have other councils of employees?

A. There are other councils.

Q. The Western Conference of Teamsters has jurisdiction over what States?

A. Eleven states; the Western Council of Teamsters is comprised of Local Unions in the eleven western states. (Tr. 127).

The deposition of Harry Rosen, employee of Dorman, was published (Tr. 130). He was a member of Local 277 of the Teamsters in New York (Tr. 130). The testimony of this witness concerned itself with what took place on the morning of July 26, 1955 when he and a "city loader" went to Dormans to unload the Dairy Distributors truck (Tr. 130-140). (It was a rule of the Local Union that when a truck came from out of town it could not be unloaded unless the firm hired a man to help unload — a "city loader." (Tr. 131)). This witness specifically stated:

A. As I said, I had no knowledge of anything like that happening until I got there that morning. I came there to work and knew nothing about anything happening at all.

Q. All you did in substance and in fact

was, you saw the picket line there and you assumed that there was a labor controversy, and so you just did not participate in unloading the truck?

A. That isn't what I said. I say, when I saw the pickets, I asked them why they were there. We had no labor trouble at our place. The gentleman told me that he had permission from our union to picket the place. Hearing that, I refused to unload the truck. (Tr. 138).

Joseph W. Ballew, representative of the Western States Dairy Employees Council, was called as a witness for the plaintiff. The witness was a traveling trouble shooter whose duties were to "assist any local unions voluntarily associated with the Council when requested for assistance in negotiation of contracts, dispute, or strike over employees' rights * * *." (Tr. 142). Under this employment the witness trailed a Dairy Distributors' truck to New York and the Dormans (Tr. 144); taking with him picket signs (Tr. 145). The Dormans were anxious to cooperate so there would be no difficulty with their own employees (Tr. 146). The witness decided to picket because he felt this would be a more forceful method of persuasion than asking plaintiff to do what he would like him to do. (Tr. 150).

Frank Fredrico, driver for Dairy Distributors, took a truck load of cheese to Dormans, arriving

September 7, 1955. He testified to the following occurrence:

A. We pulled up to Dormans dock as usual at 6:00 o'clock in the morning and Harry came down —

Q. Harry, was that Harry Rosen?

A. Yes sir.

Q. He said, "What are you fellows doing here?"

Art was the senior truck driver and said, "We are here with the load of cheese."

Harry said, "I can't unload you, you will have to wait until the Dormans get here."

Q. What did you do after that?

A. We waited for the Dormans, and the Dormans came down and said, "We will have to call the Union".

Q. To do what, sir?

A. "Call the Union".

And he called the Union and, I guess, he didn't get no result, so Art, the senior truck driver, asked Mr. Dorman if he could speak to the shop steward, and he said, "Sure".

He called the shop steward Harry, and Art asked them "Could you fellows unload the cheese?"

Art said, "No, we can't, the Union won't let us."

Q. What happened after that, sir?

A. We left and put the cheese in storage. (Tr. 152).

This driver took another load in to Dormans on October 31, 1955. The following occurred:

Q. What happened when you got to the Dorman docks October 31st?

A. Just as I started to back in, this fellow rolled out a sign and started picketing, a colored man, I don't know his name.

Q. Do you recall where he came from?

A. No I don't.

Q. Do you recall what he had on the sign when he came out and started picketing the truck?

A. No, I don't.

Q. Was that truck subsequently unloaded?

A. It was unloaded by Dormans and myself and a couple of the Dorman's boys.

Q. Do you know whether or not there was any court proceeding going on in New York at that time concerning this matter?

A. Yes, there was. (Tr. 153).

Arthur Gywellskog was the second driver on the Dairy Distributor truck that arrived at Dormans on September 7, 1955. He corroborated the testimony of the preceding witness, Fredrico, as to the occurrances of that day. On cross examination this witness detailed the "back haul" operation of Dairy Distributors (Tr. 156-168).

Jack Pearce, District Manager of Cache Valley Dairy Association, a witness for plaintiff, testified as to the Union activities directed against the Association in Southern Idaho (Tr. 42-47).

Ross Thoresen, witness for the plaintiff, was a labor relations counsel employed by Cache Valley Dairy Association in 1952 (Tr. 177). He was never employed by Dairy Distributors (Tr. 177). The witness testified that in July of 1953 the Union suspended the employees of Cache Valley Dairy Association through an open letter written by Mr. Rash (Tr. 180). The basis for the suspension was because they (the employees) did not fight for a contract the Union wanted (Tr. 180). After that the witness ceased to bargain with Mr. Rash (Tr. 180). The witness testified on further direct examination as follows:

> Q. Directing your attention to October 31st of 1955, were you in New York City at that time?
>
> A. Yes sir.
>
> Q. While you were there, did you have a conversation with Mr. Ballew?
>
> A. Yes sir.
>
> Q. Or Mr. Rash?
>
> A. Not Mr. Rash, just Mr. Ballew.
>
> Q. Who was present at the time this conversation took place?

A. There may have been others, there could have been others, but my recollection is it was just Mr. Ballew and myself.

Q. Where did the conversation take place?

A. In the courthouse there, I think it is the Federal Courthouse.

Q. What did you say to him and what did he say to you?

A. I think I asked him about the picketing that had taken place that morning at the Dormans, this was October 31st, and Mr. Ballew indicated to me that after — (Tr. 312).

* * *

Q. (By Hanson). Confine the conversation, Mr. Thoresen, to the actual picketing going on there if that was the subject of it.

A. We were discussing the picketing, yes.

Q. Go ahead.

A. Mr. Ballew said they would picket us whenever they felt like it.

Q. Did he say where they would picket you?

A. I don't remember he expressed any particular place they would picket us.

Q. Was that the sum and substance of the conversation?

A. Yes. (Tr. 184).

The witness further testified as to a meeting

held at the Ben Lomond in Ogden, Utah on August 10, 1955. He stated that the Union had not at that time been certified as the bargaining agent for the employees of Cache Valley Dairy Association (Tr. 215). Also:

> During this meeting for the first time the Union asked us to include the employees of Dairy Distributors under a contract and I advised them we couldn't include them in the same contract because in our opinion there were two different companies and there would have to be two spearate contracts, and one of them said that would be all right if we would agree to it but that the drivers had to be covered with contract too. To my recollection in the three or four years I have been associated with the Union I never recall them having made that request to us before. (Tr. 186, 187).

Edwin Gossner was recalled as a witness for the plaintiff and testified as to the suitability of Dairy Distributors' equipment for the transportation of cheese (Tr. 203-209).

Arnie Hansen was recalled on cross examination by the defendants with respect to Dairy Distributors' books (Tr. 209-229). The testimony of this witness has been hereinabove referred to.

First witness for the defense was one LeRoy Schenk. This witness drove the Dairy Distributors' truck which arrived at Dormans on July 26, 1955.

The witness testified as to the events surrounding the picketing and as to the unloading of the truck on July 27, 1955 (Tr. 233-246). There was testimony of a conversation between this witness and Gossner in the latter's office sometime in April of 1955 (Tr. 239-240). This had to do with a cut-down of expenses at that time by reduction of the number of drivers employed by Dairy Distributors (Tr. 241).

Milo Rash having theretofore testified was called as a witness for the defense. This witness testified now as to his conversation with Pierce in Idaho; (2) as to the meeting at the Ben Lomond Hotel on August 10, 1955; (3) as to the proposed contract with Cache Valley Dairy Association (the witness admitted that this contract did not cover Dairy Distributors. (Tr. 252)); (4) as to the meeting on December 6, 1955 in Mr. Thoresen's office with Mr. Skolnick of the National Labor Relations Board and others; (5) and, as to the May 31, 1955, and July, 1955 trips to New York, including the picketing activities (Tr. 246-261).

The defense published the deposition of Victor Dorman. The recorded testimony of this witness shows clearly that the object of the Union was the Cache Valley Dairy Association and that the purpose of the picketing was to force that Association to negotiate with the Union (Tr. 264-301). With

reference to a meeting with Mr. Ristuccia in the latter's office in New York, the witness testified:

> Q. On the occasion about which you are testifying, when you talked to Mr. Rash in Mr. Ristuccia's office with your brother, what, if anything, was said about picketing your establishment?
>
> MR. BECK: I object to the form of the question.
>
> THE COURT: The objection is overruled.
>
> A. They said they would picket our establishment and they showed us a picket sign or a replica of a picket sign, I believe Mr. Rash actually wrote out what would be on a picket sign if we did not cooperate.
>
> At that time my brother asked them if that were legal, and his answer was that he would take his chances upon that.
>
> Q. By cooperation in getting Cache Valley Dairy Association to comply, what did they mean, do you know? What did it mean to you when they said, will you cooperate?
>
> A. They would like them to join the union. (Tr. 272).

Joseph W. Ballew was recalled as a witness for the defense. The witness testified further as to his actions in behalf of the Union both in New York and in Utah. It is clear from the reading of his testimony that the primary purpose of the Union was to renew their contract with the Cache Valley

Dairymens Association by any available means (Tr. 302-321). The witness testified in part:

Q. It is your contention, isn't it Mr. Ballew, you represented those employes at the Cache Valley Plant?

A. Yes.

Q. If you represented them why didn't you call them out in strike?

A. I have been only involved in one strike in four and a half years.

Q. That isn't the question.

Why didn't you call them out on strike if you represented them?

A. You can't do things like that

Q. Can't you call out strikes?

A. Yes, but I don't advocate strikes.

Q. You had one up there?

A. Who?

Q. You?

A. Not me.

Q. Do you know whether a strike was held up there?

A. In 1952 I heard there was a strike.

Q. Mr. Ballew, you were here among other things to help Mr. Rash and others deal with this situation in Cache Valley?

A. Yes.

Q. That would be one way to take care

of the things, call out a strike and close the plant down?

A. That wasn't my intention.

Q. You went to New York and had Dormans picket Gossner?

A. That wasn't a strike.

Q. I am not asking whether it was a strike, it is your method of handling your problem up there?

A. You may consider it that, I don't.

Q. And a primary strike against an employer is not one of the methods you attempted?

A. I have never done it.

Q. Does your Union?

A. I don't know.

Q. You don't know whether the Teamsters ever call strikes against primary employers?

A. Certainly they do.

Q. That is what I thought —

You didn't attempt in 1955 to call Cache Valley Dairy out on strike, to get Mr. Gossner to do what you wanted?

A. No. (Tr. 312-314).

The witness admitted that there were unfair labor charges against the Union in September of 1955 (Tr. 450). Because of such pending charges the Union could not ask for a representation election. (Tr. 318).

LeRoy Schenk was recalled as a witness for the defendants (Tr. 321). The witness testified as to the condition of the cheese transported by Dairy Distributors upon arrival in New York — he stated that over a period of nearly four years, 1952-1955, there were about a dozen times he had complaints about the cheese being warm (Tr. 328).

Clarence Lott, Secretary-Treasurer, Teamsters Local 983, of Pocatello, Idaho, witness for the defense (Tr. 329). By this witness the defense offered to show wages paid to employees in cheese factories operating in Idaho and northern Utah. The Court sustained plaintiff's objection to such testimony (Tr. 329-334).

The deposition of Louis Dorman was published and the following excerpts therefrom read into the record:

> Q. Suppose a load of cheese showed up this afternoon at your docks from Smithfield, Utah, the Cache Valley plant, either by Dairy Distributors, common carrier truck, or rail, you would accept it, would you not?
>
> A. Yes sir. (Tr. 336-337).

That for the defendants; the following for the Plaintiff:

> A. Mr. Ristuccia called me in his office and there he introduced me to Mr. Rash

and Mr. Ballew and they laid the entire story before me, that Gossner was not cooperating with them at their end and they would like for us not to take cheese.

Q. By "their end", you mean in Smithfield, Utah?

A. Yes, sir. Mr. Ballew and Mr. Rash and Mr. Ristuccia all joined in the conversation, pointing out to me why I shouldn't accept the cheese, and I explained to them that I certainly would be cooperative in this thing if it was of minor importance, but inasmuch as it was of so great importance to us, that we depended so much on it, I couldn't very well just lie down and refuse to take the cheese.

Q. Did they then say that if you continue to receive cheese that they would picket your establishment?

A. Yes, Mr. Ristuccia told me that there was some understanding between different locals, and one tries to cooperate with another. And he feels that he should cooperate with this western local. And I would just have to refuse to take the cheese.

I told him and explained that I wouldn't do that, I just couldn't take that lying down, and I had to have that and we would go through with it.

Mr. Ristuccia told me that he would picket and showed me the sign of the picket, and we went and talked and talked, and we left it at that.

Q. After that conversation occurred,

when this truck appeared then, you were picketed, pickets appeared?

A. Yes, sir. It was Mr. Rash by himself at first. (Tr. 337-338).

ARGUMENT

POINT I.

DEFENDANTS WERE CLEARLY IN VIOLATION OF TITLE 29, SECTION 187, LABOR MANAGEMENT RELATIONS ACT AND MUST THEREFORE RESPOND IN DAMAGES AS THE ACT PROVIDES.

Appellants correctly assume that respondent relies upon *Section 303 of the Labor Management Relations Act,* more correctly designated as *Title 29, Section 187, U.S.C.A.* which provides:

> "(a) It shall be unlawful, for the purposes of this section only, in an industry or activity affecting commerce, for any labor organization to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacure, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is —
>
> "(1) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person;

"(2) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title;

"(b) Whoever shall be injured in his business or property by reason or any violation of subsection (a) of this section may sue therefor in any district court of the United States subject to the limitations and provisions of section 185 of this title without respect to the amount in controversy, or in any other court having the jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit. June 23, 1947, 3:17 p.m., E.D.T., c. 120, Title III, § 303, 61 Stat. 158."

Appellants admit in their brief the "pursuance of the object described" in (a) (1) above; deny the object proscribed in (a) (2); and, deny there was an "appeal by the Union to induce to concerted action a neutral employee." (Brief of Appellants, 46-49).

One activity which respondent contends was illegal on the part of appellants was to induce and encourage the employees of N. Dorman and Son to engage in a concerted refusal in the course of their employment to handle cheese received from Dairy Distributors, Inc. It is further contended by respondent that this conduct and the resultant concert-

ed refusal of Dorman's employees to handle cheese from Dairy Distributors was done with two objects or purposes which are specifically set forth in *Title 29, Section 187, U. S. C. A.* The first of these is forcing any employer or other person to cease using, selling, handling, transporting or otherwise dealing in the products of any other producer, processor or manufacturer, or to cease doing business with any other person. *Sec 187 (a) (1).* That such was one of the precise reasons for appellants' conduct is made clear by the testimony of both witnesses, Ballew and Rash.

Rash testified:

> Our purpose in going to New York was to talk to Mr. Dorman and try to get him to put pressure on Mr. Gossner with us and, of course, the question to cover the employees of Cache Valley. (Tr. 114).

Ballew testified:

> Q. The purpose in contacting Mr. Dorman was to prevail upon him to buy cheese from someone else other than Dairy Distributors or Cache Valley Dairy * * *?
>
> A. Yes, and we also ask if he could persuade Mr. Gossner to meet and bargain with us.
>
> Q. You had two points in view: One, to buy cheese at some other place and two, to meet Mr. Gossner and have him bargain with you?

A. Yes sir. (Tr. 143).

And,

* * * our purpose was to invoke the relationship of Mr. Dorman to get through to Mr. Gossner, if he could meet with us and we also prevailed on Mr. Dorman, if that were impossible, if he could duplicate his supply of that cheese from some other source. (Tr. 302).

The deposition of Victor Dorman shows:

Q. Will you state whether any suggestions were made * * * as to what you could do to get Cache Valley Dairy to cooperate?

A. They had suggested from the very start that we get our supplies elsewhere, look for another shipper. (Tr. 271, 272).

The deposition of Louis Dorman shows:

A. Mr. Ristuccia called me in his office and there he introduced me to Mr. Rash and Mr. Ballew and they laid the entire story before me, that Gossner was not cooperating with them at their end and they would like for us not to take cheese.

Q. By "their end", you mean in Smithfield, Utah?

A. Yes, sir. Mr. Ballew and Mr. Rash and Mr. Ristuccia all joined in the conversation, pointing out to me why I shouldn't accept the cheese, and I explained to them that I certainly would be cooperative in this thing if it was of minor importance, but inasmuch as it was of so great importance to us, that we depended so much on it, I couldn't very well just lie down and refuse to take the cheese. (Tr. 337).

Appellants do not deny this object (to have Dorman cease doing business with Cache Valley Dairymens Association), but contend that the means used was lawful because the Union contacted only the two Dormans and one Harry Rosen who said he was a "foreman" and that he "supervised" the loading and unloading of merchandise. Appellants contend that Rosen as a "supervisor" was not an "employee" under the act. The act defines an "employee", *Title 29, Sec. 152 (3)* and a "supervisor", *Title 29, Sec. 152 (11)*. There is no definition of a "foreman." Respondent respectfully contends that something more than the record discloses would be necessary to classify Rosen as a "supervisor" within the meaning of the act. It has been held:

> "This chapter does not except foremen * * *." *N.L.R.B.* v. *Skinner and Kennedy Stationary Co.*, (C.C.A. 1940), 113 F. (2) 667.

Respondent's cause, however, is not predicated upon the status of Rosen within the Act.

Appellants inadvertently omit from their statement of the case and from their argument the testimony of respondent's witnesses Fredrico and Gywellskog (Tr. 151-171). These were the drivers on the Dairy Distributors, Inc. truck that transported the cheese to the Dormans in New York. Their testimony makes it crystal clear that Dorman's employees refused to unload the cheese and that these refusals extended in time from July 26,

1955, through September 7, 1955. Further, Victor Dorman told Gossner that:

> "Our employees don't want to unload any more Dairy Distributors' cheese, don't send any more with Dairy Distributors' trucks." (Tr. 89).

There was a concerted refusal on the part of Dorman's employees to handle Cache Valley Dairy Association cheese; and, the employees were induced by what? *The picketing efforts of Rash and Ballew*, nothing else, because the Dormans wanted the cheese and had never told their employees not to unload it (Tr. 272, 273).

The appellants must respond in damages to respondent for violation of *Title 29, Section 187 (a) (1)* of the Act.

The second announced purpose of the appellants was to force Gossner as Manager of Cache Valley Dairymens Association to recognize and bargain with the Local Union in Ogden as the representative of his employees (Tr. 114). This they could not lawfully do unless they had been certified as the representative of such employees under the provisions of Section 159 of the Act. (*Title 29, Sec. 187, (a) ()3*). Rash testified unequivocally that when he and Ballew went to New York on May 31, 1955, Local Union 976 had not been certified by the National Labor Relations Board as representative

of the employees of Cache Valley Dairymens Association (Tr. 118, 119). But, appellants argue, it was the Union's "understanding" that they represented the association employees. (Appellant's Brief 52-57). This appellants contend even in spite of the fact that the Union had suspended these very same employees by an open letter in July of 1953 (Tr. 180) and that for about two years thereafter the Union made no demands (Tr. 189).

Appellants' contention is that the Union did nothing violative of *Section 187 (a) (2)* of the Act because "* * * the Union enjoyed a position of similar standing to that of being certified * * *." (Appellant's Brief, 58). The act itself, *Section 187 (a) (3)*, provides for no such exception. It would be a strange rule of law if a Union which *once upon a time* represented a group of employees under a contract which had expired would be permitted to suspend those employees from the Union and be permitted to claim representation and "enjoy the status of the bargaining agent" solely because an employee, an employer or another Union had not petitioned for representation in accordance with *Section 159 (C) (1) (A) and (B)* for which appellants contend. For the purpose of the picketing in New York, the Union clearly pointed out in their picket signs that the Cache Valley Dairymens Association employees at Smithfield, Utah, were NON-

UNION EMPLOYEES. Would the Union make these same employees fish for one purpose, fowl for another?

Can these appellants, from the state of the record, successfully claim here and *allege* that a substantial number of Cache Valley Dairy Association employees wished to be represented for collective bargaining by Local 976 during the period of this controversy? If the answer to that question is "no", then the Union must respond in damages for a violation of *Section 187 (a) (2)* of the Act.

Finally, under Point I of appellants' argument, they contend:

> "Even if the picketing had induced Dorman's employees to engage in a concerted refusal to handle the cheese, (as it did) defendants claim their traditional right to picket an ambulatory situs of their dispute with Gossner * * *." (Appellants' Brief, p. 63, 64).

This argument appears to be fallacious for if appellants can, as they say, violate the law with impunity, the law itself becomes a nullity. The law does not sanction picketing for an unlawful purpose. *Sloan* v. *Journal Publishing Company*, (Ore. 1958) 324 P. (2) 449.

In support of this final contention your appellants cite *N.L.R.B.* v. *International Rice Milling Co.*, 341 U.S. 665, 95 L. Ed. 1277, 71 S. Ct. 961. This case holds that where agents of a union who pic-

keted a mill encouraged two men in charge of a truck of a neutral customer of the mill to refuse, in the course of their employment, to go to the mill for an order of goods, such conduct did not constitute an unfair labor practice within the meaning of the secondary boycott provisions. The union was there picketing the primary employer at his place of business and by no stretch of the imagination can that case be pertinent to the facts of the cause at bar.

Appellants rely also upon the *National Labor Relations Board's Schultz Refrigerated Service* case, 25 LRRM 1122, ruling, and we respectfully point out in that case that, first, the picketing was limited in time and area to the *primary employer's* trucks; second, the employees involved in the labor dispute were employed by the *primary* employer to drive its trucks only in New York City; third, the employer at the time of the picketing was engaged in its normal business of transporting goods in that city; fourth, there was no other place in the city where the union could give adequate notice of its dispute with the *primary* employer; and fifth, there is no complaint of interference with the business of secondary employers.

One important test of lawfulness of a union's picketing activities in the course of its dispute with an employer is the identification of such picketing

with the actual functioning of the *primary employer's* business at the situs of the labor dispute.

In the case appellants refer to as the Campbell Coal case *(Sales Drivers, Helpers and Building Construction Drivers, Local Union 859, of International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL, Petitioner* v. *National Labor Relations Board, Respondent,* 229 F. (2) 514, 37 L.R.R.M. 2166) it will be noted that the case involved picketing at the sites *shared by the struck employer* and neutral employers. Our cause involves the picketing of Dairy Distributors' truck at the neutral employer's place of business to compel the primary employer, Cache Valley Dairymens Association to deal with the non-certified union.

N.L.R.B. v. *Service Trade Chauffeurs, etc.,* 191 F. (2) 65, also relied upon by appellants, *in fact holds*:

> "The Union clearly violated the Act in picketing the Read Warehouse. For no trucks operated by the primary employer were present at the warehouse, nor were any of its employees there engaged in the primary employer's business. The Board's findings, amply supported by the evidence, make it plain that, by this picketing, the Union induced Read's warehouse employees to engage in a concerted refusal in the course of their employment to perform their customary services — i.e., to quit work — and that they did quit, in part at least, because they were so induced by this

picketing. The Board was also clearly right in concluding that the objects of the Union's inducement were those prescribed by (a) and (b) of § 8(b) (4) — namely, to force Read to cease doing business with the primary employer and to force the primary employer to recognize the Union as the representative of its employees, although the Union had not been certified as such a representative. To that extent, therefore, the Board's decision was correct and will now be enforced."

Appellants also misconstrue the rule of the *Moore Dry Dock* case (*Sailors Union of the Pacific*, 27 LLRM 1108). Appellants with reference to this case state:

> "2. 'At the time of the picketing the *primary* employer is engaged in its normal business at the situs.' When the Gossner truck was in front of Dorman's and being picketed, Gossner's employee was there too, and in fact did, engage in Gossner's normal business of unloading cheese at that point. There is no evidence to the contrary."

But, under the facts of this cause, it is clear that Dairy Distributors, Inc. *was not the primary employer at the situs or at all* and, also, that the picketing clearly discloses (from the signs themselves) that the dispute was clearly not with Dairy Distributors, Inc. but with the primary employer Cache Valley Dairymens Association. We find no solace for appellants' cause in the authorities they cite.

The cases appellants cite to the court are exceptions to the general rule that picketing at the premises of secondary employers are violations of Section 8 (b) (4) (A) are limited to the situation where the primary employer has no separate premises *in the area of the labor dispute* which affords the union an outlet for its primary activity. The rationale behind these exceptions is that unless the union were permitted to carry its primary dispute to the neutral premises in these circumstances, its right to engage in primary activity would be virtually obliterated.

No such justification for embroiling Dorman in respondents' dispute with Cache Valley Dairymens Association exists here for Cache Valley Dairymens Association has a regular place of business where the labor dispute is located, at which respondents can engage in primary picketing. Thus, respondents are unions which are located in, and whose jurisdiction is Utah; their labor dispute with Cache Valley Dairymens Association involves employees who are hired in Utah; the terms and conditions of employment of the employees in question are fixed in Utah; and the services of said employees are entirely performed in Utah. Moreover, as testified by the witness Thoresen, Cache Valley Dairymens Association has a regular plant and place of business in Utah where respondents can engage in pri-

mary picketing (and where such picketing has in the past effectively affected the ingress and egress of the trucks of four large common carriers doing business with Cache Valley Dairymens Association). Thus, the situs of the dispute in this case is clearly located in Utah. This fact is also demonstrated by the language on the several picket signs which were carried by respondents at Dorman's premises.

Clearly, therefore, the facts of this case are distinguishable from the *Schultz* case, supra, where the dispute involved a New York union over deliveries in New York and where there was no place in New York other than the trucks of the primary employer which the Union could picket. It is also clearly distinguishable from the *Moore Dry Dock* case, supra, where the picketing union had no other place in the United States to picket. Here, the disputing union has moved its picketing 2,200 miles from the situs of its dispute and from the area of its own jurisdiction, although it has adequate facilities for primary picketing in the area where the dispute exists, and although it was unnecessary for it to do so in order to adequately appeal to the employees of Cache Valley Dairymens Association. As the Court of Appeals for the Second Circuit said in its very recent decision (November 3, 1955) in *N.L.R.B.* v. *Associated Musicians of Greater New York et al.*, (Docket No. 23550):

"It was clearly not necessary for the respondent union to picket the common premises in order to reach the other employees of the primary employer. At most three of these other employees worked at the common premises * * * while some sixty-five (primary) employees were employed at the studio of WINS (the primary premises), which respondent union was picketing. Furthermore, the few (primary) employees who ever went to the common premises spent a portion of their time at WINS and hence could be reached by picketing there."

The Court concluded that the picketing of the common premises therefore violated *Section 8 (b) (4) (A)*. The Second Circuit's decision in the *Associated Musicians* case, supra, was an acceptance by the Court of the principle enunciated by the Board in *Washington Coca Cola Bottling Works, Inc.*, 107 NLRB 299, and in other cases subsequent to *Schultz* and *Moore Dry Dock* which hold that common situs picketing cannot be engaged in where the primary employer has a regular place of business in the area of the labor dispute at which the picketing union can engage in primary picketing. The Board's *Washington Coca Cola* decision was approved and enforced by the Court of Appeals in *Brewery and Beverage Workers Drivers* v. *N.L.R.B.*, 220 F. (2) 380 (C.A. 4).

The most recent ruling to come to our attention, *N.L.R.B.* v. *United Steel Workers*, Dec. 5,

1957, 1st Circuit, 250 F. (2) 184, is completely in accord with the foregoing authorities. There the court wrote:

> "The Board on exceptions filed by the Union agreed with the ultimate conclusion reached by the trial examiner but not with his reason therefor. Relying for its authority upon Brewery Drivers and Workers etc. (Washington Coca-Cola Bottling Works, Inc.), 107 N.L.R.B. 299, 302-303, enforced sub nom. Brewery and Beverage Drivers and Workers, etc. v. N.L.R.B., 1955, 95 U.S. App. D.C. 117, 220 F. 2d 380; Local 657, International Brotherhood of Teamsters etc. (Southwestern Motor Transport, Inc.), 115 N.L.R.B. No. 155; and Sheet Metal Workers International Association Local No. 51 (W. H. Arthur), 115 N.L.R.B. No. 183, it said:
>
> " 'We agree with the Trial Examiner that the Respondents violated Section 8(b) (4) (A) of the Act by picketing the trucks of Barry, with whom the respondents had a labor dispute, at the terminals and the packaging plant of secondary employers on April 25, 1956. In so doing however, we, unlike the Trial Examiner, do not rely upon the Respondents' alleged failure to observe the Moore Dry Dock requirement that the picketing at the secondary employers' premises be conducted in a manner clearly disclosing that it was directed only against the primary employer. Apart from the fact that we believe that the Trial Examiner's finding that the Moore Dry Dock standard was not met is factually incorrect, the Board has held that the Moore Dry Dock doctrine is inapplicable to a

situation where as here the primary employer has a permanent place of business at which the union could adequately publicize its labor dispute. In these circumstances, we find, in accordance with the reasoning in Washington Coca Cola and Southwestern cases, that the fact that the picketing was conducted at the premises of secondary employers, plainly reveals that it was designed, at least in part, to induce and encourage the employees of these secondary employers to engage in a concerted refusal in the course of their employment to handle Barry's freight with an object of forcing or requiring the secondary employers to discontinue doing business with Barry and that the Respondents thereby violated Section 8 (b) (4) (A) of the Act.'

"We agree with the Board that the Moore Dry Dock doctrine, so-called, has no application to the situation disclosed by the facts in this case.

"That doctrine was devised by the Board to reconcile 'the dual congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own.' N.L.R.B. v. Denver Building & Construction Trades Council, 1951, 341 U.S. 675, 692, 71 S. Ct. 943, 953, 95 L. Ed. 1284. To effect this reconciliation the Board held as follows (footnotes omitted) in a case involving the picketing of a vessel of a primary employer tied up at a secondary employer's drydock:

" 'When a secondary employer is harbor-in the situs of a dispute between a union and

a primary employer, the right of neither the union to picket nor of the secondary employer to be free from picketing can be absolute. The enmeshing of premises and situs qualifies both rights. In the kind of situation that exists in this case, we believe that picketing of the premises of a secondary employer is primary if it meets the following conditions: (a) The picketing is strictly limited to times when the situs of dispute is located on the secondary employer's premises: (b) at the time of the picketing the primary employer is engaged in its normal business at the situs; (c) the picketing is limited to places reasonably close to the location of the situs; and (d) the picketing discloses clearly that the dispute is with the primary employer.'

"We may concede that the Moore Dry Dock doctrine would have application when the primary employer has a fixed and permanent place of business, but picketing his premises by striking employees would not in any real sense adequately publicize the labor dispute. The Board clearly recognized this in the language quoted above from its decision in the case at bar, such, apparently, was the situation in N.L.R.B. v. Service Trade Chauffers, etc., 2 Cir., 1951, 191 F. 2d 65, and it is frequently the situation in the building construction industry where more often than not most of the employees of a contractor or subcontractor are working at a building site with employees of other employers and seldom, or only very briefly, have occasion to visit their employer's yard, warehouse, office or other headquarters. See N.L.R.B. v. General Drivers, etc., 5 Cir., 1955, 225 F. 2d 205; Sales

Drivers, etc. v. N.L.R.B., 1955, 97 U.S. App. D.C. 173, 229 F. 2d 514, and its sequel Truck Drivers and Helpers Local, etc., v. N.L.R.B., D.C. Cir., 249 F. 2d 512.

> "The case at bar, however, does not present the foregoing situation, for here, so far as the record shows, all of the employees in the bargaining unit were continuously employed at Barry's manufacturing plant, except Yorke and perhaps another truck driver with whom we are not concerned, and Yorke not only must frequently have had to cross the picket line at the Barry plant on his way to and from work, but he also had occasion in the course of his pickup and delivery duties to cross the picket line in his truck at least once or twice a day. Thus by picketing the premises of the primary employer, Barry, alone, the Union had a fully adequate opportunity to publicize its labor dispute to the members of the bargaining unit generally and also to exert individual pressure on Yorke by embarrassing him into either joining the strike or quitting his job. Certainly from these facts it was logical and reasonable for the Board to draw the inference that the Union's picketing of Yorke's truck at the premises of secondary employers must have been designed, in part at least, to encourage those employers to cease doing business with Barry, or to induce their employees not to handle or transport Barry's freight. * * *"

On the foregoing authorities, we submit that it is clearly *reasonable to believe* that respondents had and have no right to picket at Dorman's premises

in New York City and that such picketing is secondary and violative of *Section 8 (b) (4) (A)* of the Act.

POINT II.

THE WESTERN CONFERENCE OF TEAMSTERS WAS A LABOR ORGANIZATION SUBJECT TO THE LABOR MANAGEMENT RELATIONS ACT; THE COURT BELOW HAD JURISDICTION OVER WESTERN CONFERENCE OF TEAMSTERS AND THE INTERNATIONAL UNION.

Appellants argue in Points II, III, and IV that no liability could be imposed on the defendant Western Conference of Teamsters or the International Union because the Western Conference is not a labor union and no jurisdiction by service of process was obtained over either the Western Conference or the International Union. We will discuss each of these propositions separately.

In Point II the appellants quote the definition of a labor organization, which appears in *Section II (5) of the Labor Management Relations Act,* and *Section 152 (5) of Title 29, U. S. C. A. and F.C.A.*, and claim that by this definition the Western Conference is not a labor organization. The only evidence in the record that it is not within the definition of the statute is the self-serving statement of Joseph Ballew that the Western Conference is not a labor union (Tr. 149). The definition in the act, however, refers not to a labor union but a labor organization.

The definition referred to above says that a labor organization is "an organization of any kind or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, *in whole or in part* of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."

Joseph Ballew testified that he was in Utah as an employee and representative of the Western States Dairy Employees Council, a division of the Western Conference of Teamsters (Tr. 141). Ballew, by his own statement, was in Utah as a representative of the Western Conference to assist local unions "in negotiation of contracts, disputes, or strikes over employees rights" (Tr. 142). Ballew also claims he was sent to Utah to assist in those duties and did assist the local union in Ogden, No. 976 (Tr. 142).

There can be no question that Ballew consulted and advised with local union officials, assisted in planning, preparation of picketing and the actual picketing in New York (Tr. 143). It seems clear that the orgainzation by which he was employed, the defendant Western Conference of Teamsters, existed in part at least for the purpose of dealing with employers concerning grievances, labor disputes, and the other matters referred to in the defi-

nition of a labor organization in *Title 29, Sec. 152 (5), U.S.C.A.* The Court's attention is invited to the case of *International Longshoremen's & Warehousemen's Union, Local 8* v. *Hawaiian Pineapple Company, et al.*, a Ninth Circuit Court decision, found at 226 F. (2) 875. In that case an action was brought by the Pineapple Company for damages under the same section of the act which is the basis of this lawsuit. The defendant local and the international union claimed as a defense that the persons acting were not acting as agents for either the local union or the international.

In answer to this contention the decision cites *Sec. 185 (e) of Title 29*, as follows:

> "For the purposes of this section, in determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling. (June 23, 1947, c. 120, Title III, #301, 61 Stat. 156)."

At page 880 of the opinion the following language appears as a construction of this section:

> "Probably the practical result of the section in the case of labor unions was to restore the general rules of agency, particularly the rules of apparent authority which had been curtailed by the Wagner Act, 29 U.S.C.A. #151 et seq. and the decision of United Bro-

> therhood of Carpenters and Joiners of America v. United States, 330 U.S. 395, 67 S. Ct. 775, 91 L. Ed. 973. We think the section was intended to cover the acts of officers of the union who deal with employers or with the public. That is, if a union puts or lets an officer or other representative get into a position where he can and does cause trouble proscribed by the act then the union is responsible."

It seems clear that Ballew on behalf of the Western Conference and for the Western Conference, as part of the International Union, was in Utah for the specific purpose of helping the local union and that he did so. The Western Conference, the local union in Ogden, and the International Union let its representative get into a position where he could and did cause trouble of the kind complained of in this lawsuit and therefore, the local, the Western Conference, and the International are responsible for his acts under the statute and the decisions construing it.

Under Point III, the appellants claim that no jurisdiction over the Western Conference could be obtained because it maintained no employees, no payroll, and had no knowledge whatever of the situation which gave rise to this lawsuit.

The fact is that by his own statement Ballew was sent to Utah for the specific purpose of assisting Local 976 in its dispute with the Cache Valley

Dairy Association (Tr. 142). His employer was the Western States Dairy Employees Council, a part of the Western Conference (Tr. 141, 142). The Western Conference is by Ballew's assertion part of the International Union (Tr. 143, 144).

In Point IV of appellant's brief the same contention is made about the International Union as for the Western Conference. The same testimony as to its connection with the activity complained of here is applicable.

This same question of jurisdiction was considered in the case of *United Mine Workers of America* v. *Patton*, 211 F. (2) 742, a 1954 decision of the Court of Appeals for the 4th Circuit.

This case was a damage action under the same section of the Taft-Hartley Act, *Sec. 187 of Title 29, U.S.C.A.*, as is the basis of this lawsuit, and the violations claimed by the plaintiff were of sub-sections 1 and 2 of Sec. 187 (a) as in this case.

The opinion contains the following discussion of the question here raised by the appellants:

> "The chief argument of defendants in support of their motion for directed verdict is that there is no evidence that they authorized or ratified the strikes upon which plaintiffs rely for recovery. It is true that there is no evidence of any resolution of either the United Mine Workers or District 28 authorizing or ratifying the strikes. There is evidence, however, that the strikes were called

by the Field Representative of the United Mine Workers, who was employed by District 28, and that he was engaged in the organization work that was being carried on by the international union through District 28, which was a mere division of the international union. Members of the union are members of local and district unions as well as the international; and of the $4 monthly dues paid by them, $2 goes to the international union, $1 to the local union and $1 to the district organization. It is clear that in carrying on organizational work in the field representative is engaged in the business of both the international union and the district and that both are responsible for acts done by him within the scope and course of his employment. Stockwell v. United States, 13 Wall. 531, 545-548, 20 L. Ed. 491; Hindman v. First Nat. Bk. of Louisville, 6 Cir., 112 F. 931, 57 L.R.A. 108; Oman v. United States, 10 Cir., 179 F. 2d 738; United States v. Waters, 7 Cir., 194 F. 2d 866; Jefferson Standard Life Ins. Co. v. Hedrick, 181 Va. 824, 27 S.E. 2d 198; 2 Am. Jur. 279."

In this case the witness Rash testified dues were paid to the local union and a per capita to the international union (Tr. 116). He further testified that Ogden Local 976 was in trusteeship; that Jack Annan of Los Angeles, California was the trustee appointed by the Executive Board of the International Union (Tr. 121-123).

In the Patton case, the union defendants argued that they should be exempt from liability because of

certain previous decisions construing the Norris-LaGuardia Act. The Patton decision points out that the Taft-Hartley Act adopts a new rule exemplified by *Sec. 185 of Title 29, U.S.C.A.* The decision says as follows:

> "It is clear, however, that the rule as so interpreted was not adopted by the Labor Management Relations Act and that its application to suits under that act was expressly excluded by section 301 (e), 61 Stat. 156, 157, 29 U.S.C.A. #185 (e), which provides:
>
> " 'For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.'
>
> "The section of the Act under which this action is brought, 303 (b), 29 U.S.C.A. #187 (b), expressly provides that suits thereunder shall be subject to the limitations and provisions of section 301, 29 U.S.C.A. #185, as will be seen by reference to the section which is quoted in full above.
>
> "The history of the Act shows clearly that the intent of Congress was to apply to suits of this character the common law rules with respect to liability for acts of an agent."

Based upon an examination of the decisions construing the statutes here involved the special section on Agency (*Sec. 185, Title 29, U.S.C.A.*), and the testimony of Ballew and Rash, respondent

submits that jurisdiction of the Western Conference and the International Union was acquired and they cannot escape responsibility for the acts of their representatives. Certainly by no stretch of one's imagination could they be considered "strangers to this action."

POINT III.

THE CASE WAS PROPERLY SUBMITTED TO THE JURY, WHICH WAS CORRECTLY AND ADEQUATELY INSTRUCTED.

Points V, VI, VII and VIII of appellants' brief raise various questions and the discussion of these points is intended to apply to all of them.

Among the matters raised is the admissibility of books and records of the plaintiff corporation.

The appellants raised no objection when the records were offered, but said after an examination of the books and records an objection might be made (Tr. 68). No such objection was ever thereafter made and appellants cannot now complain about their being received as exhibits. They were received and sent to the jury.

It should be pointed out that this suit was filed June 29, 1956, and not tried until October 23, 1957. Appellants made no attempt by subpoena, deposition, or otherwise, to examine the books and records introduced before the case was tried.

Appellants cite the court to *Eureka Hill Mining Company* v. *Bullion Beck & Champion Mining Com-*

pany, 32 Utah 236, 90 P. 157, a 1907 Utah case, as support for the claim that the books are inadmissible as being incompetent evidence.

The quotation from that case which appears in appellants' brief is from a Referee's Report quoted by the court. Further, it does not refer to business records which were admitted in evidence in that case, but to notations appearing on the original records. The original records were admitted. The case simply does not stand for the proposition for which the appellants cite it.

The admissibility of business records under the so-called "shop-book" rule has been the law in this state for many years.

In *Clayton v. Metropolitan Life Insurance Company*, a 1938 case, 85 P. (2) 819, a discussion of the rule as applicable to hospital records is set forth and says the following:

> We recognize that the practice at common law in requiring the presence in court of the writer, or the identification of his handwriting, of each piece of writing, figure or notation introduced in evidence was too strict. The shop-book rule, permitting the introduction of books of original entry made in the usual course of business and introduced from proper custody and upon general authentication, was a wise liberalization. This court has recognized the shop-book rule. Welsh, Driscoll & Buck v. Buck, 64 Utah 579, 585,

232 P. 911; Utah Commercial & Savings Bank v. Fox, 44 Utah 323, 140 P. 660; Walker Bros. v. Skliris, 34 Utah 353, 361, 98 P. 114; Ogden Packing & Provision Co. v. Tooele Meat & Storage Co., 41 Utah 92, 124 P. 333."

This court has recognized and adopted in addition to the "shop-book rule" the "regular entry rule." In *State v. Davie*, 240 P. (2) 265, the opinion by Mr. Justice McDonough says:

> "The records referred to were properly identified by employees or attendants in the several offices as records kept in the regular course of business. While these records, as used in this case, do not, strictly speaking, fall within the 'shop book rule', they are admissible for the same reasons which gave rise to that rule which has long since had the approval of this court. See cases listed in Clayton v. Metropolitan Life Insurance Company, 96 Utah 331, 85 P. 2d 819, 120 A.L.R. 1117. They were correctly admitted in evidence under what is called 'the regular entry rule.' 32 C.J.S., Evidence, #683B, p. 554, states: 'In addition to the shopbook rule, another very generally established rule, adopted by statute in some jurisdictions and sometimes spoken of as "the regular entry rule," is that regular entries made in the course of business * * * are admissible in evidence when a proper foundation is laid.' It is no longer necessary to have the person who made the records identify them. If he cannot be obtained as a witness, other employees who know the facts can do so. See 32 C.J.S., p. 554 referred to above; 20 Am. Jur., Evidence, Sec. 1070. It is the prerogative of the trial court to determine

> when such foundation is laid and sufficient showing of the credibility of the evidence is established. This requirement was met in the instant case."

The business records introduced for the respondent were properly identified by the witness Hansen, who made the entries. A proper foundation was laid to bring them within the "shop-book rule" or the "regular entry rule" (Tr. 64, 65, 66), and the trial judge was correct in receiving the exhibits offered.

In the discussions under Points V, VI, VII and VIII, the appellants refer to Instruction No. 11 and apparently argue that it correctly states the law on the subject. With this contention the respondents agree and respondents also agree that in the absence of objection such an instruction becomes the law of the case. The submission of this instruction cannot possibly have prejudiced the appellants.

The claim is made by appellants that the proof is not sufficient to sustain the damages awarded because it permitted a result based upon speculation. In support of this they refer to *United States* v. *Griffith, et al*, 210 Fed (2) 11. In this case the Tenth Circuit Court disallowed a judgment for loss of profits because of failure of the evidence to support the judgment. However, the only evidence of loss of profits was the oral statement of the president of the plaintiff and no books or records were

ever produced. This case is certainly not authority for the proposition that lost profits cannot be recovered if proper evidence of such loss is introduced.

The respondent contends that adequate and competent evidence was introduced in this case to sustain the verdict and the judgment thereon, and that the verdict was not based upon speculation or guess work.

The question of recovery for loss of profits in the future was discussed in the case of *United Mine Workers* v. *Patton*, 211 Fed. (2) 742, which has been referred to earlier. The Patton case was an action for damages under the section of the Taft-Hartley Act, the same section that is the basis for this action. In that case the plaintiffs acquired coal mining equipment and secured a lease on mining property from the Clinchfield Coal Company and conducted mining operations. The lease was later cancelled pursuant to its terms and the court inferred because the union was attempting to make the plaintiff and other lessees employ union labor. The plaintiffs were told that they could renew the lease and thereafter could operate either with union or non-union employees. They began operations again on a non-union basis and were shut down because of a strike against Clinchfield and the strike against Clinchfield was the basis of the suit. The three year renewal lease was signed by Clinchfield

but was never actually delivered to the plaintiffs.

The defendant union argued that no proper evidence of loss of profits was submitted and that the judgment awarded plaintiff of $150,000.00 was speculative. With respect to this contention the court says at page 745 of the opinion as follows:

> "On the question of damages the evidence is that plaintiffs purchased the equipment of Moore for $25,000 paying only $10,000 in cash and the remainder on a tonnage basis as their mining operations went forward. From March 1949 to March 1950 they returned net income as a result of the operations of approximately $47,000 and contend that the actual profits were in excess of $60,000. They introduced a witness who estimated the profits for the remaining months of the three year lease at $125,274.92, based on the old operating costs and the current price of coal, and at $232,289.62, based upon reduced cost of operations considered possible.
>
> "On these facts we think that the case was one for the jury under Sec. 303 (b) of the Labor Management Relations Act, 61 Stat. 158, 159, 29 U.S.C.A. Sec. 187 (b)."

Later in the opinion the court refers to the question of speculation as to damages and says the following quoting *Story Parchment Company* v. *Paterson Parchment Paper Company*, a U. S. Supreme Court case:

> "Another argument is that no damage has been shown because it is said that the

three year lease had not been delivered and future profits of the business which plaintiffs were forced to abandon were purely speculative. We think however, that the evidence sufficiently showed that plaintiffs had established a profitable business under the arrangement they had with Clinchfield, and that irrespective of the three year lease a sufficient basis had been laid for an award of damages. As said by the Supreme Court in Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 563, 51 S. Ct. 248, 250, 75 L. Ed. 544, a tort case arising under the Sherman Act:

" 'Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person; and thereby relieve the wrongdoer from making any amend for his acts. In such case, while the damages may not be determined by mere speculation or guess, it will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result be only approximate. The wrongdoer is not entitled to complain that they cannot be measured with the exactness and precision that would be possible if the case, which he alone is responsible for making, were otherwise.'

"See also Bieglow v. R.K.O. Radio Pictures, Inc., 327 U. S. 251, 66 S. Ct. 574, 90 L. Ed. 652, and Polar Steamship Corp. v. Inland Overseas Steamship Corp., 4 Cir., 136 F. 2d 835."

It is the position of the respondents that there was ample competent evidence on which the question of loss of future profits should have been submitted to the jury and that the verdict returned was not based upon conjecture or speculation or guess work.

The claim is made by appellants that no damages could be recovered by respondent because he did not have a contract with the Cache Valley Dairy Association to buy, nor a contract with N. Dorman and Sons by which they agreed to purchase any particular amount of product from the respondent.

There is no merit in this contention. No case has been found nor any rule of law which restricts recovery for loss of profits either in an action under the Taft-Hartley Act or otherwise to those cases in which a contract is involved.

Nothing in this record even suggests that the respondent would not have had a continuing source of supply. His source was one of the largest swiss cheese manufacturing plants in America.

The record shows that the President of the respondent had been doing business with N. Dorman and Sons since 1946, and had conducted a growing volume of business with that company (Tr. 9).

Victor Dorman testified that respondent was supplying 50% of the swiss cheese handled by his company (Tr. 277).

Louis Dorman testified that respondent was an important source of supply and he could not take the union's insistance that he find other sources "lying down." His statement is as follows:

> "A. Yes sir. Mr. Ballew and Mr. Rash and Mr. Ristuccia all joined in the conversation, pointing out to me why I shouldn't accept the cheese, and I explained to them that I certainly would be cooperative in this thing if it was of minor importance, but inasmuch as it was of so great importance to us, that we depended so much on it, I couldn't very well just lie down and refuse to take the cheese."

The evidence clearly shows that except for the conduct of the union and its representatives complained of in this action respondent could have continued to do business with N. Dorman and Sons indefinitely in the same or greater volume.

Appellant claims also that N. Dorman and Sons didn't stop buying from respondent because of picketing. This just isn't the case. Victor Dorman told Gossner not to send any more cheese of Dairy Distributors, Inc. because his employees would not unload it. This was told Gossner orally and he was notified in writing. The following testimony was given by Gossner under cross-examination by Mr. Beck:

> "Q. Did you make any effort after you made the decision, or at the time you were

making the decision to stay in business or to use your equipment, so you wouldn't be damaged so much, in other words to diminish your damages?

"A. Well, I think I did. I have tried to convince the people back there to keep buying Dairy Distributors cheese, and I was told that Dorman employees would not unload any more that was Dairy Distributors cheese.

"Q. Who told you Dormans wouldn't unload any more Dairy Distributors cheese?

"A. The man I do business with back there, one of the Dormans said, 'Our employees don't want to unload any more Dairy Distributors cheese, don't send any more with Dairy Distributors trucks.' "

N. Dorman and Sons continued to do business with the Cache Valley Dairy Association, but not with the respondent Dairy Distributors, Inc.

POINT IV.

THERE WAS NO EVIDENCE THAT PLAINTIFF WAS UNLAWFULLY ENGAGED IN INTERSTATE COMMERCE AND DEFENDANTS' CONTENTION TO THE CONTRARY IS IRRELEVANT TO THE ISSUES.

Under Points IX and X of appellants' brief it is contended that plaintiff should be denied recovery because respondent was unlawfully engaged in interstate commerce. This contention is without merit.

Appellants set forth numerous sections of the Interstate Commerce Act, Title 49, Transportation. With all of the enumerated sections relied upon by

appellants we have no quarrel. Respondent's contention is that he was a "private carrier" as defined by the Act. A private carrier is defined by the Act as:

> "The term 'private carrier of property by motor vehicle' means any person not included in the terms 'common carrier by motor vehicle' or 'contract carrier by motor vehicle', who or which transports in interstate or foreign commerce by motor vehicle property of which such person is the owner, lessee, or bailee, when such transportation is for the purpose of sale, lease, rent, or bailment, or in furtherance of any commercial enterprise."

(U.S.C., p. 7180-81, Sec. 303 (17)).

Under the Powers and duties of the Commission, it is declared:

> "It shall be the duty of the Commission—
>
> * * *
>
> "(3) To establish for private carriers of property by motor vehicle, if need therefor is found, reasonable requirements to promote safety of operation, and to that end prescribe qualifications and maximum hours of service of employees, and standards of equipment. In the event such requirements are established, the term 'motor carrier' shall be construed to include private carriers of property by motor vehicle in the administration of subsection (c) of this section and sections 305, 320, 321, 322 (a), (b), (d), (f), and (g), and 324 of this title." *(U.S.C., p. 7182, Sec. 304 (3)).*

There is nothing shown, proved or indicated

in the record in this cause to even suggest that the Commission has or should have exercised its authority so as to invoke the provisions of Section 304 (c) which provides:

> "Upon complaint in writing to the Commission by any person, State board, organization, or body politic, or upon its own initiative without complaint, the Commission may investigate whether any motor carrier or broker has failed to comply with any provision of this chapter, or with any requirement established pursuant thereto. If the Commission, after notice and hearing, finds upon any such investigation that the motor carrier or broker has failed to comply with any such provision or requirement, the Commission shall issue an appropriate order to compel the carrier or broker to comply therewith. Whenever the Commission is of opinion that any complaint does not state reasonable grounds for investigation and action on its part, it may dismiss such complaint." *(U.S.C. p. 7183, Sec. 304 (c)).*

Appellants do not and cannot contend that they or anyone else made complaint to the Commission or that the Commission upon its own initiative complained against respondent for any failure to comply with any provision of the Transportation Act. For a lack thereof it must be presumed that your respondent was at no time unlawfully engaged in interstate commerce. The record in fact shows that the Interstate Commerce Commission was aware of the

Dairy Distributors' trucking operation. Edwin Gossner testified:

> "We have been checked by the Interstate Commerce Commission and the National Labor since the Union put pressure on us the last few years we have had every agency I know of check our books and we have come out pretty clean with the Interstate Commerce Commission too." (Tr. 82).

(This testimony was stricken from the record as not being responsive and the jury instructed to disregard it, but it is the fact.)

Cases relied upon by appellants, *Stickle Co. v. Interstate Commerce Commission,* (10th Cir.), 128 F. (2) 155; *George Truck Systems, Inc.* v. *Interstate Commerce Commission,* (5th Cir.) 123 F. (2) 210; *Scott* v. *Interstate Commerce Commission,* 213 F. 30, are not determinative of a course of conduct contended for by appellants which has never been adjudicated.

POINT V.

DEFENDANTS OFFER NO AUTHORITY FOR THEIR FURTHER CONTENTIONS, ALL OF WHICH ARE NOT MERITORIOUS.

Without benefit of authority appellants claim error on the part of the trial judge for having refused proffered testimony as to wages paid to cheese workers at cheese factories other than the Cache Valley Dairymens Association. The Court sustained an objection based upon the grounds that such evi-

dence would be irrelevant and immaterial to the issues and that no proper foundation had been laid for the admission of such testimony. The matter was considered in chambers (Tr. 333, 334). It appears apparent that as to the cause of respondent, Dairy Distributors, Inc., the objection was well taken and properly sustained.

Appellants also claim error in the admission in evidence of respondent's Exhibit P-4. The exhibit is a letter written to Edwin Gossner by Victor Dorman informing Gossner that the Union would not permit the unloading of Cache Valley Dairy Association cheese which had been shipped via "Mid-States" truck lines. The exhibit is certainly material to show a course of conduct on the part of the Union and is therefore and to that extent material to this cause. However, even if that were not so, we call this Court's attention to the fact that this letter was produced upon the insistence and demand of appellants, the record shows:

> "Q. (By Mr. Beck). What was the reason Victor Dorman gave you — was this conversation over the telephone or in writing when he told you something about your cheese not being unloaded?
>
> A. I have some of it in writing and some of it on telephone conversation.
>
> Q. Will you bring us the communications you have in writing?

A. I think I can.

MR. BECK: Make sure of that Mr. Hanson, please." (Tr. 91).

Appellants further claim the Court erred in admitting respondent's Exhibit P-16 and say:

> "That Exhibit purports to be an audit of some of the books of plaintiff. The record fails to show whether the books claimed to have been audited were or were not received in evidence. That being so, it would seem self-evident that the Exhibit was incompetent." (Brief of Appellants, p. 106).

As to the books referred to by appellants here, the record shows:

> "MR. HANSON: We offer the Exhibit in evidence, P-2.
>
> MR. ELIAS HANSEN: No objection at this time, we probably will after we interrogate him further.
>
> MR. HANSON: The books are available and the books have been available since the suit started.
>
> MR. ELIAS HANSEN: We have no further examination of Mr. Hansen at this time.
>
> THE COURT: Do you have any cross examination?
>
> MR. ELIAS HANSEN: I may have a lot of cross examination after I examine the books." (Tr. 68).

Appellants thereafter had the books for the

purpose of examining them and the further interrogation of the bookkeeper, Arnie Hansen, nowhere shows an objection to these exhibits (Tr. 209-229). Appellants made full use of the exhibits.

Finally appellants contend that the trial court's refusal to grant a new trial was further error.

For all of your appellant's contentions under Points XI, XII, XIII and XIV of the Brief of Appellants, no authorities for such contentions are directed to this Court's attention.

CONCLUSION

The verdict and judgment should be affirmed, costs to respondent.

Respectfully submitted,

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